(4)

Supreme Court, U.S.
FILED
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No. 98-480

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

COMM-CARE CORPORATION

Petitioner,

v.

LOUISIANA TAX COMMISSION, et al.

Respondents.

ON PETITION OF WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF LOUISIANA

APPENDIX OF RESPONDENTS

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96 pp

PARTIES REPRESENTED

This Appendix in support of the Opposition to Petition for Writ of Certiorari is filed on behalf of the following respondents: Rich Bailey, in his capacity as Assessor of Ouachita Parish; Bobby L. Cudd, in his capacity as Assessor of Beauregard Parish; Gerald McCrory, Jr., in his capacity as Assessor of Ascension Parish; Lee J. Thevenot, in his capacity as Assessor of Avoyelles Parish; Eugene W. Cavanaugh, in his capacity as Assessor of Vernon Parish; Ralph R. Gill, in his capacity as Assessor for Rapides Parish Tax Assessor; Jewette Farley, in his capacity as Assessor of Lincoln Parish; Carmon F. Walker, in his capacity as Assessor of Catahoula Parish; and, Frank Granger III, in his capacity as Assessor of East Baton Rouge Parish.

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APPENDIX

§ 18. Ad Valorem Taxes

(E) Review. The correctness of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all in accordance with procedures established by law.

Art. 854 Form of Pleading

No technical forms of pleading are required.

All allegations of fact of the petition, exceptions, or answer shall be simple, concise, and direct, and shall be set forth in numbered paragraphs. As far as practicable, the contents of each paragraph shall be limited to a single set of circumstances.

Art. 891 Form of petition

A. The petition shall comply with Articles 853, 854, and 863, and, whenever applicable, with Articles 855 through 861. It shall set forth the name, surname, and domicile of the parties; shall contain a short, clear, and concise statement of all causes of action arising out of, and of the material facts of, the transaction or occurrence that is the subject matter of the litigation; shall designate an address, not a post office box, for receipt of service of all items

involving the litigation; and shall conclude with a prayer for judgment for the relief sought. Relief may be prayed for in the alternative.

* * *

Art. 1003 Form of answer

The answer shall comply with Articles 853, 854, and 863 and, whenever applicable, with Articles 855 through 861. It shall admit or deny the allegations of the petition as required by Article 1004, state in short and concise terms the material facts upon which the defenses to the action asserted are based, and shall set for the all affirmative defenses as required by Article 1005. It shall also contain a prayer for the relief sought. Relief may be prayed for in the alternative.

Art. 1004 Denials

The answer shall admit or deny the allegations of fact contained in each paragraph of the petition, and all such allegations, other than those as to the amount of damages, are admitted if not denied in the answer. If the defendant is without knowledge or information sufficient to justify a belief as to the truth of an allegation of fact made in the petition, he shall so state and this shall have the effect of a denial. Denials shall fairly meet the substance of the allegations denied. When the defendant intends in good faith to deny

only a part of or to qualify an allegation of fact, he shall admit so much of it as is true and material and shall deny or qualify the remainder.

§ 1989. Review of appeals by tax commission

A. Within ten days of receipt of the assessment lists as certified by the local board of review, the tax commission shall conduct public hearings to hear appeals of taxpayers, bona fide representatives of an affected tax-recipient body, or assessors from the action of the board of review.

B. The tax commission shall consider the appeal of any taxpayer, bona fide representative of an affected tax-recipient body, or assessor dissatisfied with the determination of a local board of review and may affirm, reverse, or modify the contested determination of that board of review.

C. All such hearings shall be conducted in accordance with the rules and regulations established by the tax commission.

D. All decisions by the tax commission are final unless appealed to the district court within thirty days.

E. The assessment lists, together with any changes in connection therewith, shall be certified and returned to each assessor on or before October 15 of each year.

§ 1992. Inspection of assessment lists; notification and review of assessments by board of review; hearing officers

A. (1) After each assessor has prepared and made up the lists showing the assessment of immovable and movable property in and for his parish or district, his lists shall be exposed daily for inspection by the taxpayers and other interested persons for the period provided for in Subsection G of this Section. Each assessor shall give notice of such exposure for inspection in accordance with rules and regulations established by the Louisiana Tax Commission.

(2) A property owner or authorized agent of the property owner may make a written request for notice of the current year's assessment of the property of which he is the owner; however, such request shall be made no sooner than the first day of June of that year, and such request shall be received by the assessor of the parish or district in which the property is located no later than June fifteenth of that same year. The authorized agent of the taxpayer shall provide with the request for the assessment, written authorization from the taxpayer for that agent to act as the authorized agent of the taxpayer in the request of the notice of an assessment. The property owner shall provide to the assessor at

the time of the mailing of the notice, appropriate means for the return of the notice such as a self-addressed envelope of sufficient size and adequate postage to hold the notice requested. The assessor, at not cost to him, shall deliver to the property owner through the means provided by the property owner a written notice of the assessed value of the property no later than the close of business on the third day for inspection of the assessment lists as provided for in Subsections F and G of this Section. However, the failure to provide the written notice provided in this Paragraph shall not result in any extension of time for an appeal of assessment.

B. After the lists of each assessor have been exposed for inspection for the period provided for in Subsection G of this Section. Each assessor shall give notice of such exposure for inspection in accordance with rules and regulations established by the Louisiana Tax Commission.

C. The board of review shall consider the written or oral complaint of any person desiring to be heard who has timely filed the report or reports as required by Chapter 6 of Subtitle III of Title 47, R.S. 47:2301 et seq., and who has provided to the board of review at least seven days prior notice either through appearing in person at the board of review's office or by filing such

complaint by certified mail. Contrary provisions of law notwithstanding, the written or oral complaint of any bona fide representative of an affected tax recipient body shall be considered by the board of review provided such representative has provided seven days prior notice to the board in the manner provided in this Section and has furnished the owner's name and address, a description of each property contested, and the assessment number of each property contested; nothing contained herein shall be construed to authorize a tax recipient body to challenge the assessment of all property within its taxing jurisdiction in a single complaint. The validity of each assessment shall be determined on its own merits using recognized appraisal techniques. The board of review may make a determination to increase or decrease the assessment of immovable or movable property made by the assessor in accordance with the fair market or use valuation determined by the board.

D. All determinations by the board of review shall be final unless appealed to the tax commission. Any taxpayer or assessor dissatisfied with the determination of the board of review may appeal to the tax commission in accordance with rules and regulations established but the tax commission.

E. On the fifteenth day after the board of review shall have commenced the

public hearings as provided herein, the assessment lists, together with any changes in connection therewith, shall be certified and sent to the tax commission within three days.

F. In Orleans Parish, the procedure for review of assessments shall be as follows:

(1) Each assessor shall prepare and make up the lists showing the assessment of immovable and movable property in and for his district; the lists shall be exposed daily, except Saturday, Sunday, and legal holidays for inspection by the taxpayers and other interested persons during the period August first through August fifteenth of each year unless August fifteenth falls on a weekend or a legal holiday, when the period shall extend until the next business day. Each assessor shall give notice of such exposure for inspection in accordance with rules and regulations established by the Louisiana Tax Commission. On or before the tenth business day after August fifteenth, the assessors shall certify their rolls to the board of review.

(2) The board of review shall consider all written complaints which have been filed in compliance with the following procedure:

(a) The complaint form provided by the board, through the office of the assessor, must be completed in

conformity with the requirements of the board of review.

(b) The complaint form must be received in the assessor's office within three business days after August fifteenth.

(c) The form must be forwarded by the assessor and received by the board of review within seven business days after August fifteenth.

(d) The taxpayer must have timely filed the reports as required by R.S. 47:2301 et seq. and R.S. 47:2321 et seq.

(3) The board of review shall convene hearings on or before September fifteenth. The board may create one or more hearing officers, any one of whom shall be a member of the board of review and who may conduct all required public hearings of the board with or without the presence of the other members, provided that no final action may be taken by such board of review unless quorum is present. The board may make a determination to increase or decrease the assessment of real or personal property made by the assessor in accordance with the fair market or use valuation determined by the board.

(4) The board of review shall certify the assessment list to the Louisiana Tax Commission on or before October twentieth of each year.

§ 1993. Preparation and filing of rolls by assessor

A. (1) As soon as the assessment lists have been approved by the parish governing authorities as boards of reviewers, the assessors shall prepare the assessment rolls in triplicate after which one copy shall be delivered to the tax collector, one copy to the Louisiana Tax Commission, one copy to the recorder of mortgages, and two copies of the grand recapitulation sheet to the legislative auditor.

(2) If an assessor uses electronic date processing equipment to prepare the assessment rolls, the assessment data produced shall be made available upon request in a useable electronic media.

(3) The assessors shall prepare said rolls by parish, school board, police jury, levee district, special district and by any other recipients of ad valorem taxes, except by municipality. If any municipality requests such a roll, the assessor shall be required to prepare such a roll; however, the assessor's salary and expense fund shall be reimbursed by the municipality in accordance with R.S. 47:1993.1(c).

(4) If any municipality prepares its own tax rolls and assessment lists, upon approval of these rolls and/or lists by the parish governing authorities as boards of reviewers, each municipality shall prepare and submit to the Louisiana Tax Commission and the

legislative auditor an annual statement of its millage rates and assessed valuation of property within its respective jurisdiction.

B. The assessors of the parishes of this state shall not file and deposit with the tax collector of their respective parishes the assessment rolls of any current year until the collector shall present a receipt or quietus from the auditor and the parish governing authority that all state and parish taxes assessed on the rolls of the preceding year have been paid or accounted for. If the tax collector is unable to present this receipt or quietus, the assessor shall immediately notify the auditor, the governing authority, and the supervisor of public accounts of his completion of the assessment rolls of his parish and of his inability to file them by reason of the tax collector not having obtained the required quietus. Any assessor who shall violate the provisions of this Paragraph shall forfeit any and all commissions to which he may be entitled from parish or state for his labors in making and writing the assessment rolls.

C. The assessors shall secure the approval of the tax commission before filing their assessment rolls with the tax collector, and the tax commission may instruct all tax collectors not to receive from the assessor any assessment roll or collect any taxes thereon

without the written consent of the tax commission. The tax commission may require the assessors to take an oath in a form to be prescribed by the tax commission declaring that he has complied with its instructions.

D. Each tax assessor, parish of Orleans excepted, shall complete and file the tax roll of his parish on or before the 15th day of November in each calendar year. The officer having custody of the assessor's salary and expense fund shall withhold from the assessor's salary five dollars ($5.00) for each day of delay in the filing of the roll after such date.

E. Filing in the recorder's office shall be full notice to each taxpayer, and to each other person whom it may in any manner concern, that the listing, assessment, and valuation of the taxable property has been completed, that the rolls are on file in the sheriff's or tax collector's office and in the office where the mortgage records are kept and that the taxes are due and collectible, as provided by law.

F. The act of depositing the rolls by the assessor in the office where the records of the parish are kept, shall be deemed prima facie evidence that the assessment has been made and completed in the manner provided by law. No injunction shall be issued by any court to prevent any assessor from depositing the rolls. In the suit of any taxpayer

testing the correctness of his or their assessments before any court of competent jurisdiction, the decision of such shall only affect the assessment of the person or persons in such suit, and shall in no manner affect or invalidate the assessment of any other person or property appearing upon the tax rolls.

G. From the day the roll is filed in the recorder's office, it shall act as an lien upon each specific piece of real estate thereon assessed, which shall be subject to a legal mortgage after the thirty-first day of December of the current year for the payment of the tax due on it, but not for any other tax, which mortgages shall prime and outrank all other mortgages, privileges, liens, encumbrances or preferences, except tax rolls of previous years.

H. The recorder of mortgages shall keep the roll delivered to him among the record books of his office, and it shall be a part of the record of such office. He shall index the tax roll in the current mortgage book under the head of "tax roll" and no further record thereof shall be necessary; however, the failure of the recorder of mortgages to mark the tax rolls "filed" or to index them shall in no way prejudice the rights of the state or any parish or municipal corporation.

§ 1993.1 Additional duties of assessors; deposit of funds; reimbursement of costs by municipalities

A. The requirements of R.S. 47:1957(A) shall be deemed to be additional duties and obligations of the various assessors' offices.

B. Any funds received from any municipality for reimbursement of costs incurred by the assessor in the preparation of any listings and/or rolls shall be deposited into the assessor's salary and expense fund and shall not constitute additional income or salary to the assessor.

C. If any municipality requests a listing or roll of the assessor, the assessor shall be entitled to demand and receive from such municipality reimbursement to the assessor's salary and expense fund in an amount not to exceed one dollar per listing for the first five thousand listings. For each listing greater than five thousand, there shall be an additional reimbursement not to exceed fifty cents per listing. However, in each parish the assessor may be entitled to a reimbursement to the assessor's salary and expense fund, in an amount to be determined by the assessor but in no case to exceed the provisions of this Subsection.

§ 1997. Filing of rolls, payment of taxes, and sale of property for delinquent taxes; Orleans parish

A. Beginning with the year 1963, on or before the fifteenth day of October of each year, copies of the rolls showing the final assessment of real and personal property shall be sent to the city and state tax collector for the parish of Orleans, the state comptroller, the recorder of mortgages for the parish of Orleans and the director of finance of the city of New Orleans. The collection of taxes shall begin on the first day of January of the year for which such taxes are levied. Said taxes may be paid in two equal installments payable, respectively, in January and May of each year beginning with the year 1964; provided that the taxpayer shall pay one-half of said taxes during the month of January. Unless the taxpayer during the month of January shall pay all real estate, personal, and public utilities taxes on property owned by him in the parish of Orleans or one-half thereof, as hereinabove provided, the entire amount of such taxes shall become delinquent on the first day of February and said taxed shall bear ten per cent per annum delinquent penalty from the date of delinquency until paid. If a second installment is elected as hereinabove provided it shall be

delinquent on the last day of May and shall bear the ten per cent per annum delinquent penalty from the date of delinquency until paid. On the thirty-first day of December of each year, commencing with December 31, 1963, the director of finance of the city of New Orleans, under such regulations as may be prescribed by the city council, shall forthwith proceed to advertise and sell for delinquent taxed the real estate and public utilities upon which taxes are delinquent and shall proceed to enforce the collection of delinquent property taxes. The proceedings by the director of finance for the enforcement of the payment of delinquent real estate, personal property, and public utilities taxes shall be in the manner and form as now provided by law.

B. Beginning with the year 1971, on or before the fifteenth day of October of each year, copies of the rolls showing the final assessment of real and personal property shall be sent to the city and state tax collector for the parish of Orleans, the state comptroller, the recorder of mortgages for the parish of Orleans and the director of finance for the city of New Orleans. The collection of taxes shall begin on the first day of January of the year 1972, and for each year thereafter, for which such taxes are levied. Beginning with the year 1972, the entire amount of such taxes shall become

delinquent on the first day of February and said taxes shall bear ten percent per annum delinquent penalty from the date of delinquency until paid. On the thirty-first day of December of each year, commencing with December 31, 1972, the director of finance of the city of New Orleans, under such regulations, as may be prescribed by the city council, shall forthwith proceed to advertise and sell for delinquent taxes the real estate and public utilities upon which taxes are delinquent and shall also proceed to enforce the collection of delinquent personal property taxes. The proceedings by the director of finance for the enforcement of the payment of delinquent real estate, personal property, and public utilities taxes shall be in the manner and form as now provided by law.

19TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
NUMBER: 425,365 DIVISION " M"

COMM-CARE CORPORATION
VERSUS

LOUISIANA TAX COMMISSION, and
LEE J. THEVENOT, in his capacity as assessor for the PARISH OF AVOYELLES; JEWETTE FARLEY, in her capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER, in his capacity as capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION' EUGENE CAVANAUGH, in his capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES PARISH; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA, RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and
JOE TORN TRUNZLER, in his capacity as Sheriff and Ex-Officio Tax collector of the PARISH OF CATAHOULA; WILLIE WAYNE HOUCK, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF LINCOLN; WILLIAM EARL HILTON, in his

capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF RAPIDES; FRANK A. HOWARD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF VERNON; HAROLD L. TRIDICO, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF ASCENSION; WILLIAM BELT, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF AVOYELLES; M. BOLIVAR BISHOP, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF BEAUREGARD; ELMER LITCHFIELD, in his capacity as Sheriff and Ex-Officio Tax Collector for the PARISH OF EAST BATON ROUGE; LAYMON GODWIN, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF OUACHITA

FILED:_____ _____

DEPUTY CLERK

PETITION FOR JUDICIAL REVIEW

The Petition for Judicial Review of Comm-"Care Corporation, ("Petitioner"), with respect represents:

1.

This petition is brought pursuant to La. R.S. 47:1998A(1) to review a decision of the Louisiana Tax Commission (the "Commission") rendered February 13, 1996. A copy of the Commission's decision is attached as Exhibit 1 and pleaded fully herein.

2.

The Commission is a public body, and is made defendant herein pursuant to La. R.S. 47:1989(D) and 1998A(1) as this is an appeal from a decision of the Commission adverse to Petitioner relative to 1995 ad valorem taxes, penalties and interest (the "taxes") assessed against the facilities described in paragraph 7 hereinbelow.

3.

Lee J. Thevenot, Jewette Farley, Roy D. Miller, Gerald McCrory, Jr., Eugene Cavanaugh, Frank Grander, III, Ralph Gill, Carmon Walker, and Rich Bailey (the "Assessors") are the duly elected and commissioned assessors, respectively, of the Parishes of Avoyelles, Lincoln, Beauregard, Ascension, Vernon, Baton Rouge, Rapides, Catahoula, and Ouachita, who assessed the taxes, and are made defendants herein in their official capacities as necessary parties defendant, as their interests may appear.

4.

Defendants, Joe Torn Trunzler, Willie Wayne Houck, William Earl Hilton, Frank A. Howard, Harold L. Tridico, William Belt, M. Bolivar Bishop, Elmer Litchfield, Laymon Godwin (the"Sheriffs") are the duly elected and commissioned Sheriffs and Ex-Officio Tax Collectors, respectively, of the Parishes of Catahoula, Lincoln, Rapides, Vernon, Ascension, Avoyelles, Beauregard, East Baton Rouge, and

Ouachita, to whom Petitioner paid all of the Taxes under protest, and are made defendants herein pursuant to La. R.S. 47:1998A(2) for the purpose of causing the Sheriffs to hold the Taxes paid to them under protest segregated pending the outcome of this suit.

5.

Article VII, Section 21B(1)(a) of the Louisiana Constitution of 1974 establishes that all property owned by a nonprofit entity organized and operated exclusively for charitable or health purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax, is exempt from ad valorem taxation.

6.

Petitioner is a non-profit corporation organized and operated exclusively for charitable and health purposes, no part of the net earnings of which inure to the benefit of any private share holder or member thereof and Petitioner has been declared to be exempt form federal and state income taxes.

7.

From March 1, 1994, through the date hereof, Petitioner has been and remains the sole owner and operator of ten (10) nursing homes (the "Facilities") in various parishes of the State, namely: Community Care Center of

Leesville in Vernon Parish, Community Care Center of in Lincoln Parish, Baker Manor Nursing Home in East Baton Rouge Parish, Beauregard Nursing Center in Beauregard Parish, Tioga Manor in Rapides Parish, Bayou Vista Nursing Center and Oak Haven Nursing Home in Avoyelles Parish, The Columns in Catahoula Parish, D'ville House in Ascension Parish, and Ridgecrest Nursing Home in Ouachita Parish.

8.

Petitioner timely filed with the Assessors renditions with respect to the Facilities for 1995 ad valorem tax purposes in which Petitioner claimed all of the Facilities to be exempt from ad valorem taxation under Article VII, Section 21B(1)(a) of the Louisiana Constitution of 1974.

9.

The Assessors disallowed Petitioner's said claims for exemption of the Facilities and scheduled the Facilities for assessment of 1995 ad valorem taxes.

10.

Upon notice of such disallowance, Petitioner timely filed Notices of Appeal, Requests for Board of review (Form 3101), pursuant to La. R.S. 47:1992©, with the respective parish Boards of Review, and Petitioner appeared before the respective Boards of Review and asserted its claim that the

Facilities are exempt for ad valorem taxation.

11.

All of the Boards of Review affirmed the decisions of the Assessors that the Facilities are not exempt from ad valorem taxation.

12.

Pursuant to La. R.S. 47:1992(D), Petitioner timely appealed the decisions of the Boards of Review to the Commission.

13.

On February 13, 1996, following a hearing and the introduction of overwhelming and uncontroverted evidence, the Commission found that "Comm-Care Corporation is a non-profit corporation operated for health and welfare purposed, exempt from federal and state income taxation as required in the 1974 Constitution Article VII, Section 21B(1)(a)."

14.

The Commission's said finding, as alleged in paragraph 13 hereinabove, is tantamount to a determination, *ipso facto*, that Petitioner's Facilities are exempt form ad valorem taxation.

15.

The Commission's decision that Petitioner's Facilities were not exempt from ad valorem taxation, despite its finding as alleged in paragraph 13 hereinabove, was arbitrary and capricious and amounted to a clear abuse

or unwarranted exercise of the Commission's discretion and must therefore be reversed.

WHEREFORE, Petitioner Comm-Care Corporation prays that after due proceedings had herein the decision of the Tax Commission be REVERSED and judgment rendered herein in favor of Petitioner Comm-Care Corporation (i) determining that all of Petitioner's Facilities are exempt from ad valorem taxation under Article VII Section 21B(1)(a) Louisiana Constitution of 1974, (ii) ordering the defendant Sheriffs to refund to Petitioner all of the Taxes paid under protest by Petitioner, with interest pursuant to La. R.S. 47:2110(A), and (iii) for such other and further relief as law, equity and the nature of the case may require.

Respectfully submitted,

/s/ John A. Stassi, II
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/s/ Paul S. West
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Ninth Floor, One American Place
Baton Rouge, Louisiana 70895
(504) 383-9000

ATTORNEYS FOR
COMM-CARE CORPORATION

CERTIFIED TRUE COPY
MARCH 8, 1996
BY: /s/Deputy Clerk

No. 425,365

COMM-CARE CORPORATION	§	19TH JUDICIAL DISTRICT COURT
VERSUS	§	PARISH OF EAST BATON ROUGE DIVISION "M"
LOUISIANA TAX COMMISSION, ET AL	§	STATE OF LOUISIANA
FILED: _____	§	_____ DEPUTY CLERK

DECLINATORY AND PEREMPTORY EXCEPTIONS

NOW INTO COURT, through undersigned counsel, come Defendants, LEE J. THEVENOT, in his capacity as assessor for the PARISH OF AVOYELLES; JEWETTE FARLEY, in his capacity as Assessor for the PARISH OF LINCOL; ROY D. MILLER, in his capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION; EUGENE CAVANAUGH, in capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA; RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and FRANK A. HOWARD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH

OF VERNON (hereinafter referred to as Exceptors) appearing herein solely for the purpose of these exceptions, who except to the Plaintiff's suit and petition on the following grounds:

1.

Plaintiff brings this action before a Court of improper venue, insofar as the Defendant and Exceptor, FRANK A. HOWARD is concerned. Accordingly, Exceptors assert an exception of improper venue.

2.

Plaintiff's suit is prescribed; Plaintiff is required by law to exhaust administrative remedies prior to commencement of judicial proceedings, and Plaintiff's suit is void of any allegations of having complied with the statutory and Constitutional guidelines, in particular with R.S. 47:2110 and 2101, which require payment of the taxes under protest in the year(s) for which the taxes are due.

3.

The allegations of Plaintiff's petition are devoid of any statement or allegation that the taxes for the year 1995 have been paid at all, much less by the December 31, 1995 deadline. Louisiana Constitution Article 7, Section 18(E) mandates that the procedures established by law for challenging the correctness of assessments be complied with, which procedure was not followed correctly by Plaintiff herein.

4.

The petition of Plaintiff discloses no cause of action, in that Plaintiff has failed to timely pay the taxes under protest, as required by law, and failed to comply with the required procedures to protest the assessment, as detailed hereinabove.

WHEREFORE, Exceptors pray the these exceptions be maintained and Plaintiff's suit be dismissed at Plaintiff's cost.

RESPECTFULLY SUBMITTTED,

/s/Tony C. Tillman

Tony C. Tillman
P.O. Drawer 648
Leesville, LA 71496-0648
(318) 239-7983
Bar Roll ID #12791

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been served upon John A. Stassi, II 3838 North Causeway Blvd., Suite 3030, Metarie, Louisiana 70002, and Paul S. West, 9th Floor, One American Place, Baton Rouge, Louisiana 70895, either by mailing it by first-class United States Mail, properly addressed and postage prepaid, or by delivery on this 18th day of March, 1996.

/s/Tony C. Tillman
Tony C. Tillman

No. 425,365

COMM-CARE CORPORATION	§	19TH JUDICIAL DISTRICT COURT
VERSUS	§	PARISH OF EAST BATON ROUGE DIVISION "M"
LOUISIANA TAX COMMISSION, ET AL	§	STATE OF LOUISIANA
FILED: _____	§	_____ DEPUTY CLERK

MEMORANDUM IN SUPPORT OF DECLINATORY AND PEREMPTORY EXCEPTIONS

NOW INTO COURT, through undersigned counsel comes Defendants, LEE J. THEVENOT, in his capacity assessor for the PARISH OF AVOYELLES; JEWETTE FARLEY, in his capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER, in his capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION; EUGENE CAVANAUGH, in capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA; RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and FRANK A. HOWARD, in his capacity as Sheriff and

Ex-Officio Tax Collector of the PARISH OF VERNON (hereinafter referred to as Exceptors) and for their Memorandum in Support of Declinatory and Peremptory Exceptions respectfully state the following:

The plaintiff herein, COMM-CARE CORPORATION, has instituted suit against the above Defendants in their capacities Assessors and Sheriffs for parishes in the State of Louisiana, along with the Tax Commission. Plaintiff contends that it is a non-profit, tax-exempt, corporation and not subject to ad valorem taxation. Its suit seeks a judgment declaring it to be a tax-exempt entity and seeks the return of certain sums from the various tax collectors.

Plaintiff prays that the Sheriffs be ordered to return all taxes paid under protest by Petitioner, but its Petition is devoid of any allegations that such taxes were paid under protest for the tax year 1995. The tax year at issue in the present suit is the collection for calendar year 1995.

The Petition filed in the above-entitled matter does not disclose any sums allegedly paid under protest, nor specify the amount of any sums which are sought to be recovered by Petitioner herein.

Exceptors filed an exception of improper venue. R. S. 13:5104(B) provides that a suit against a political subdivision of the State, or against an

employee or officer of the subdivision, for conduct arising out of the discharge of his official duties shall be instituted before the district court of the judicial district in which the subdivision is located. Louisiana R.S. 13:5102(B) defines a political subdivision that includes the sheriff in that definition. Accordingly, any suit against the exceptor, FRANK A. HOWARD, in his official capacity as the Sheriff and Tax Collector of Vernon Parish, Louisiana must be instituted in Vernon Parish, Louisiana, and, accordingly, an exception of improper venue should be granted.

Exceptors have filed exceptions of no cause of action and prescription, which are aimed essentially at the same issues. Petitioner has ignored substantial Constitutional and statutory provisions which detail the actions required to be taken by a taxpayer if the taxpayer desires to contest its assessment.

Section 18(E) of Article 7 of the Louisiana Constitution of 1974 provides that the correctness of assessments are first subject to review by the Parish governing authority and then by the Tax Commission and only "finally" by the courts, and that such review should take place "in accordance with procedures established by law." These procedures are detailed in Title 47.

Plaintiff's Petition does not contend that it timely paid the 1995 taxes under protest, and an examination of the Petition will disclose that it is devoid of any reference to payment of any of the taxes under protest at any time. However, on information and belief, Exceptors contend that all payments made by the Petitioner were made subsequent to January 1, 1996, and accordingly not made on or before December 31, 1995 as is required by law.

R.S. 47:2110 governs suits to recover taxes paid under protest. Petitioner apparently contends that, because the suit was filed within 30 days of its payment, that it is entitled to proceed with this litigation. However, Petitioner fails to acknowledge that the payment itself must have been made no later than December 31 of the year in which the taxes are assessed and due. Therefore, the payment of taxes at any time after December 31, 1995 is too late to allow Plaintiff to contend the taxes at this stage by payment under protest and subsequent litigation.

This issue has specifically been previously addressed by the Court in the case of Capital Drilling Co. vs. Graves, 496 So.2d 487, La.App. 1st Cir. (1986). In Graves, the Court was faced with the issue of timeliness of the payment of taxes "under protest." In Graves, the taxes were paid in March of 1985 for taxes due in the year 1984. The

defendant in that case filed exceptions of no cause of action and prescription, as have been filed in the instant case. The First Circuit in Graves reviewed the issues of prescription, reviewed in detail R.S. 47:2110, and considered the application of R.S. 47:1998 and Louisiana Constitution of 1974, Article 7, Section 25(A). After thorough review of the Constitutional and statutory provisions, the Court concluded that the payment under protest must be made in the calendar year in which the assessment is made.

Accordingly, in the present case, Petitioner must have made the payments on or before December 31, 1995. The Petition curiously avoids any mention whatsoever of the time of payment of any of the taxes on any of the properties in question.

As the First Circuit Court of Appeal points out in Capital Drilling and as it held in Bunch v. Town of St. Francisville, 446 So. 2d 1357 (LA App. 1st Cir. 1984) "the meaning and intent of the law is to be determined by the consideration of the law in its entirety and all other laws on the same subject matter." Petitioner apparently will contend that R.S. 47:2110 is a statute on its own, not part of the balance of the Code, and that it has to be interpreted in a vacuum, on its own, without regard to the balance of the sections dealing with *ad valorem* taxes.

Section 1998 is part of Subtitle III, provisions relating to *ad valorem* taxes, Chapter III, Assessment, Part III, Assessment Procedure. However, §2101 and §2110 are both part of Chapter IV dealing with payment and collection, Part II, Payment and Collection Procedure. Therefore, §2101 establishes the time for payment of all *ad valorem* taxes, and cannot be totally separated or segregated from §2110.

Section 2101 provides in part, in Subsection A(1) that

> "all taxes shall be collected in the year in which the assessment thereof is made, and they shall be designated as the 'taxes for the year,' accordingly as they are collectable. The taxes assessed in each year shall be due in that calendar year..."

Accordingly, all *ad valorem* taxes are <u>due</u> in the calendar year for which they are assessed. Therefore, as §2101 A(1) goes on to provide, "that they shall be paid on or before the 31st day of December in each respective year..."

In <u>Graves</u>, the First Circuit further states that they correctness of assessments by the assessor must be appealed administratively first to the Parish governing authority, and then to the tax commission; only thereafter can the assessment be appealed judicially (see Louisiana Constitution 1974,

Article 7, Section 18(E); R.S. 47:1992; R.S. 47:1989; and R.S. 47:1998.)

For the reasons detailed above, Exceptors contend that the Court should sustain its exceptions of no cause of action and prescription.

Pursuant to Local Rule VIII of the 19th Judicial District Court, undersigned counsel declares that it appears that evidence will be taken at the hearing on these exceptions, and counsel anticipates calling witnesses, as well as having substantial documentary evidence to introduce.

RESPECTFULLY SUBMITTTED:

/s/Tony C. Tillman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been served upon John A. Stassi, II 3838 North Causeway Blvd., Suite 3030, Metarie, Louisiana 70002, and Paul S. West, 9th Floor, One American Place, Baton Rouge, Louisiana 70895, either by mailing it by first-class United States Mail, properly addressed and postage prepaid, or by delivery on this 18th day of March, 1996.

/s/Tony C. Tillman
Tony C. Tillman

19TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

NUMBER: 425,365 DIVISION " M"

COMM-CARE CORPORATION

VERSUS

LOUISIANA TAX COMMISSION, and

LEE J. THEVENOT, in his capacity as assessor for the PARISH OF AVOYELLES; JEWETTE FARLEY, in her capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER, in his capacity as capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION' EUGENE CAVANAUGH, in his capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES PARISH; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA, RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and

JOE TORN TRUNZLER, in his capacity as Sheriff and Ex-Officio Tax collector of the PARISH OF CATAHOULA; WILLIE WAYNE HOUCK, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF LINCOLN; WILLIAM EARL HILTON, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF RAPIDES;

FRANK A. HOWARD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF VERNON; HAROLD L. TRIDICO, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF ASCENSION; WILLIAM BELT, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF AVOYELLES; M. BOLIVAR BISHOP, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF BEAUREGARD; ELMER LITCHFIELD, in his capacity as Sheriff and Ex-Officio Tax Collector for the PARISH OF EAST BATON ROUGE; LAYMON GODWIN, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF OUACHITA

FILED:_____ _____

DEPUTY CLERK

MEMORANDUM IN OPPOSITION TO
PEREMPTORY AND DECLINATORY EXCEPTION

NOW INTO COURT, through undersigned counsel, comes petitioner Comm-Care Corporation ("Comm-Care") and respectfully submits this memorandum in Opposition to the Peremptory and Declinatory Exceptions of the defendant assessors.

STATEMENT OF FACTS

Article VII, Section 21B(1)(a) of the Louisiana Constitution of 1974 establishes that property is exempt from ad valorem taxation if it is owned by a

nonprofit entity organized and operated exclusively for charitable or health purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax. Comm-Care is a non-profit corporation organized and operated exclusively for charitable and health purposed, no part of the net earnings of which inures to the benefit of any private shareholder or member thereof, and Comm-Care has been declared to be exempt from federal and state income taxes.

On March 1, 1994, Comm-Care bought ten (10) nursing homes (the "Facilities") in nine separate parishes in the State. The Facilities' ad valorem tax status for 1994 is presently the subject of a separate proceeding filed in this Court under La. R.S. 47:2110, dismissed on defendants' exception of prescription on appeal in the Court of Appeal, First Circuit.

For 1995 ad valorem tax purposes, Comm-Care timely filed renditions with the defendant assessors and claimed all of the facilities to be exempt form ad valorem taxation under Article VII, Section 21B(1)(a) of the Louisiana constitution of 1974. The assessors disallowed Comm-Care's claims for exemption and assessed the facilities for 1995 ad valorem taxes. Upon notice of such disallowance, Comm-Care timely

filed Notices of Appeal, Requests for board of Review (Form 3101), pursuant to La. R.S. 47:1992(C), with the respective parish boards of review, and Comm-care appeared before the respective boards of review and asserted its claim that the facilities are exempt from ad valorem taxation. All of the boards of review affirmed the decisions of the assessors that the facilities are not exempt form ad valorem taxation. Pursuant to La. R.S. 47:1992(D), Comm-Care timely appealed the decisions of the boards of review to the Louisiana State Tax Commission.

On February 13,1996, following a hearing and the introduction of essentially uncontroverted evidence, the tax commission found that "Comm-Care Corporation is a non-profit corporation operated for health and welfare purposes, exempt from federal and state income taxation as required in the 1974 Constitution Article VII, Section 21B(1)(a)." In spite of this finding, however, the Commission ruled against Comm-Care based on its further determination, contrary to Constitution and the evidence adduced, "that Comm-Care was not operating its nursing homes in a 'charitable' manner." On February 13, 1996, the day of the tax commission's adverse determination, Comm-Care paid the 1995 taxes under protest. On February 27, 1996, within thirty (30) days of the Tax Commission's

decision, Comm-Care filed a Petition for Judicial Review with this Court and caused all of the respective sheriffs, as tax collectors of the nine parishes, to be served with notice of this suit.

LAW AND ARGUMENT

The defendant assessors claim prescription and no cause of action because Comm-Care's payment under protest was not made before December 31, 1995.

Comm-Care's Petition for Judicial Review was filed under La. R.S. 47:1998, not La. R.S. 47:2110, as the assessors seem to believe. Comm-Care has exhausted all administrative remedies, and it is now seeking judicial review because it is dissatisfied with the action of the tax commission. See paragraph 1 of the Petition. Under La. R.S. 47:1998,

Any taxpayer or bona fide representative of an affected tax-recipient body in the state dissatisfied with the action of the tax commission under the provisions of R.S. 47:1989, shall have the right to institute suit within thirty days of the decision of the tax commission in either the district court for the parish where the tax commission is domiciled or the district court where the property is located contesting the correctness of assessment. . . .

. . 47:1998(A)(1). (Emphasis added).

In this case, the decision of the tax commission was rendered on February 13, 1996, and Comm-Care's Petition was filed on February 27,1996, within thirty (30) days. Comm-Care's cause of action under La. R.S. 47:1998 is not prescribed regardless whether the subject taxes were paid before or after the end of the year. In Rickey Tri-Key Partnership v. Dupleix, 462 So. 2d 235, 236 (La. App. 3d Cir. 1985), payment of 1982 taxes was made under protest on January 27, 1983. The tax commission affirmed the assessment on April 22, 1983, and the petition for review was filed on May 23, 1983, within thirty (30) legal days of the tax commission's decision. The Court of Appeal held that the suit was not prescribed:

> LSA-R.S. 47:1998(A) expressly gives appellant the right to contest an adverse decision of the Tax Commission in district court within thirty days of that decision. Id. at 236.

The Court differentiated between La. R.S. 47:2110, which requires that suit be filed within thirty (30) days of payment under protest, and La. R.S. 47:1998, which requires that suit be filed within thirty (30) days of the tax commission's decision. Id. at 236-37.

Comm-Care filed its petition within the requisite thirty (30) days following

the tax commission's decision, as required by La. R.S. 47:1998. Defendants cannot fabricate additional prerequisites that are not a part of the statute to deny Comm-Care its right to judicial review. Comm-Care abided by the requirements of La. R.S. 47:1998, and cannot be precluded from seeking judicial review of the tax commission's adverse determination.

The rules of statutory construction do not provide for interpretation of a statute when it is unambiguous. Louisiana Civil Code article 9 states:

> When a law is clear and unambiguous and its application does not lend to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

La. R.S. 47:1998 is not ambiguous or unclear. Thus, the statute itself must be interpreted as written. Comm-Care complied with the requirements of the statute, and its cause of action is not prescribed.

The assessors make much of the fact that the 1995 taxes were paid after December 31. However, La. R.S. 47:1998A(2) clearly provides for this:

> Any taxpayer who has filed suit under this provision and whose taxes have become due shall pay said taxes under protest and shall cause to issue notice to the

officer designated by law for the collection of such tax under the provisions of R.S. 47:2110(E). However, the portion of taxes that is not in dispute shall be paid without being made subject to the protest. (Emphasis added.)

La. R.S. 47:2110E provides:

Any taxpayer in the state who has paid his taxes under protest as provided herein and who has fled suit under the provisions of R.S. 47:1856, R.S. 47:1957, or R.S. 47:1998, shall cause to issue in said suit notice to the officer or officers designated for the collection of said taxes in the parish or parishes where the property is located, and such notice shall be sufficient to cause said officer or officers to further hold said amount segregated pending the outcome of the suit. (Emphasis added.)

La. R.S. 1998A(2) obviously contemplates this precise situation for review being filed by a taxpayer "whose taxes have become due" i.e. after December 31. Thus, a post-December 31 payment under protest is no bar to a La. R.S. 47:1998 petition for review.

CONCLUSION

Comm-Care has complied with all of the requirements of La. R.S. 47:1998,

which is the statute under which review of a tax commission decision is sought. Comm-Care's Petition for Judicial Review was timely filed within thirty days of the tax commission's decision, and the assessors' exception of prescription must therefore be denied.

Respectfully submitted,

__/s/John A. Stassi II_____

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has this 24th day of April, 1996, mailed a copy of the foregoing pleading to all counsel of record for all other parties in this action by placing same properly addressed in the U. S. Mail with sufficient postage to insure delivery.

/s/ John A. Stassi II

John S. Stassi, II

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 97-CA-0555

COMM-CARE CORPORATION
Plaintiff-Applicant
VERSUS
LOUISIANA TAX COMMISSION, ET AL
Defendant-Respondent

ORIGINAL BRIEF OF APPELLEES, LEE J. THEVENOT, JEWETTE FARLEY, ROY D. MILLER, GERALD MCCRORY, JR., EUGENE CAVANAUGH, FRANK GRANGER, III, RALPH GILL, CARMON WALKER, RICH BAILEY, JOE TORN TRUNSLER, AND WILLIE WAYNE HOUCK ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE THE HONORABLE CELIA R. CANGELOSI, JUDGE
DIVISION "M", CIVIL DOCKET NO. 425,365

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CIVIL CASE

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STATEMENT OF THE CASE

Comm-Care Corporation (hereinafter referred to as Comm Care) filed a petition for judicial review in the 19th Judicial District court, on February 27, 1996, from an adverse decision by the Louisiana Tax Commission, rendered on February 13, 1996. The Defendants filed exceptions of prescription and of no cause of action.

The Honorable Celia R. Cangelosi of the 19th Judicial District Court maintained the Defendant's exception of prescription and dismissed the appeal, with prejudice, at Plaintiffs' cost.

The Plaintiffs in due course filed a devolutive appeal from that adverse judgment and applied for a writ of Review of the Supreme Court, which writ was denied. The matter comes before this court on the appeal from the final decision of the 19th Judicial District Court.

I. SPECIFICATION OF ERRORS

Plaintiffs contend that the trial court made the following errors:

1. The trial court erred in maintaining the Defendants' exception of prescription because the statute under which this appeal of the tax Commission's decision arises does not require that the subject taxes must be paid when "due."

2. The trial court erred by reading La. R.S. 47:1998 in pari materia with La. R.S. 47:2110, and thereby

reading into La. R.S. 47:1998 its own interpretation of La. R.S. 47:2110, that an appeal to the District Court under La. R.S. 47:1998 will not lie if the subject taxes are not paid when "due" on December 31 of the tax year, when it was impossible for Comm-Care to pay the tax when "due" without divesting the Tax Commission of its jurisdiction before it decided the case before it.

3. The trial court erred by maintaining Defendant's exception of prescription in a 1998 case when it was impossible to pay the taxes when "due" without divesting the Tax Commission of its jurisdiction.

4. The trial court erred by denying Comm-Care judicial review of the Tax Commission's decision in accordance with La. R.S. 47:1998, thereby violating Comm-Care's Due Process rights under the 14th Amendment of the United States Constitution.

II. ARGUMENT

A. APPELLATE CONTENDS THAT THE TRIAL COURT ERRED IN MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION BECAUSE THE STATUTE UNDER WHICH THIS CAUSE OF ACTION ARISES DOES NOT REQUIRE THAT THE SUBJECT TAXES MUST BE PAID.

Appellate contends that it could not have paid the taxes before the end of the tax year, without depriving the Tax Commission of its jurisdiction, pursuant to LSA R.S. 47:1990. This

argument was raised by the Appellate at the trial level, and the trial court properly rejected that argument. As Judge Cangelosi sets forth in her written reasons for judgment, citing the decision of this court in Comm-Care Corporation vs. La Tax Commission, 96-0039 (La. App. 1st Cir. 1996) and cases cited therein, Judge Cangelosi states:

The First Circuit has consistently, continually, and recently held that taxes "paid under protest" must be paid prior to becoming delinquent and that taxes paid after the due date of December 31, of the tax year are delinquent taxes, defeating a claim for recovery of delinquent taxes paid under protest under Section 2110. (See page 4 of Judge Cangelosi's written reasons.)

Judge Cangelosi continues to state that she could not ignore the First Circuit's construction of the term "due" as distinguished from taxes that are "delinquent". As Judge Cangelosi correctly notes, Title 47 does not provide any scheme whereby a taxpayer can use and administrative appeal process to operate as a stay or suspension to pay the taxes when they become "due". Additionally, as she correctly notes, R.S. 47:1998 A(1) does specifically provide that any taxpayer who files suit under that section and whose taxes have become due shall pay the taxes under protest. The legislature obviously contemplated that

cases arising under Section 1998 would still be pending as of December 31, and specifically provided that to preserve other rights to litigate the issue of the taxes, the taxes must be paid under protest when they become due. There is therefore no great mystery or revelation in an argument that 1998 does in fact require the timely payment of taxes, as defined by R.S. 47:2101.

The Appellate also further ignores the ruling of the Supreme Court of Louisiana in Triangle Marine, Inc. vs. Savoie, 95-2873 (La. 1996). The court in that case specifically held that a challenge to the imposition of ad valorem taxes assessed against exempt property is a tax legality challenge which must be pursued directly in district court pursuant to R.S. 47:2110 and not through the administrative process of R.S. 47:1998. Therefore, if the trial court's decision with regard to the issue of the exception of prescription were to be overturned by this court, in light of the Supreme Court's ruling in Triangle Marine vs. Savoie, the exception of no cause of action filed herein buy the respondent should have been granted. The court's ruling in Triangle Marine was not a departure from prior jurisprudence, an the court in that case details the lines of cases utilized by the court in recognition the distinction between correctness and legality issues.

B. APPELLATE CONTENDS THAT THE TRIAL COURT ERRED IN READING LA. R.S. 47: 1998 IN PARI MATERIA WITH LA. R.S. 47:2110

plaintiff's own petition is ample evidence that this assignment of error has no merit. In paragraph 1 of Plaintiff's Petition for Judicial Review, Plaintiff assets that the petition is brought pursuant to R.S. 47:1998 A(1), however in the prayer of Plaintiff's petition, Plaintiff prays for a refund to petitioner of all of the taxes paid under protest, "with interest pursuant to La. R.S. 47:2110 (A)."

Plaintiff's petition clearly recognizes that there is a relationship between Section 1998 and Section 2110. Section 1998 is part of subtitle 3, provisions relating to ad valorem taxes, Chapter III Assessment, Part III Assessment Procedure. Sections 2101 and Section 2110 are both part of Chapter IV dealing with payment and collection, Part II, Payment and Collection Procedures. Therefore, Section 2101 establishes a time for all ad valorem taxes to be paid, and should be read in conjunction with Section 2110 as well.

Appellate relies on Churchill Farms, Inc. vs. Louisiana Tax Commission 338 So.2d 963 (LA App. 4th Cir 1976) for the proposition that § 1998. Appellee agrees that was, in fact, the ruling of the Fourth Circuit Court of Appeals,

according to the facts presented to it in the Churchill Farms case. However, the case is distinguishable since the issue of timely payments was not before the Court nor was it addressed in any fashion. The issue of when taxes are found to be due, as that is defined by §2110 (A), was not presented in Churchill Farms, and therefore Churchill Farms is not authority for the proposition that §2101 should not be construed in *pari materia* with §2110 or 1998. Churchill Farms must be limited to facts, which concern whether the taxpayer, as a condition precedent to challenging the legality of assessment of §2110, had to file a sworn list of its assets. That issue is separate from the facts of the present case, and therefore the ruling in Churchill Farms is distinguishable and not relevant to the issue presented in the instant case.

Appellate further contends that the Third Circuit in Rickey Tri-Key Partnership v. Dupleix, 462 So. 2nd 235, 236 (La. App. 3d Cir. 1985), is authority for the proposition that Section 1998 and Section 2110 should not be read in conjunction with each other. Judge Cangelosi took note of that decision, and rejected its reasoning, correctly noting that the late payment of taxes was not made the issue in that case. Therefore the decision of the court in Rickey is not authority for the proposition as cited by Appellates.

Furthermore, Comm-Care's reliance on Rickey is misplaced, in that it ignores Section 1998 A(2) as discussed above, which requires that when the taxes become due, such taxes shall be paid under protest.

C. THE APPELLATE CONTENDS THAT THE TRIAL COURT ERRED BY MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION IN A 1998 CASE WHEN IT WAS IMPOSSIBLE TO PAY THE TAXES WHEN "DUE" WITHOUT DIVESTING THE TAX COMMISSION OF ITS JURISDICTION.

Appellee contends that Comm-Care is incorrect in its contention that the Tax Commission looses its jurisdiction totally if the taxes are paid if the decision is final. R.S. 47:1998 (A)2 specifically requires the payment of taxes when they become due. R.S. 47:2110 provides that the taxes are paid under protest, and are held in a segregated account pending the outcome of the suit. Accordingly, the Appellees contend that the Tax Commission would not under such circumstances be divested totally of its jurisdiction, in that the taxes have not actually been paid to the taxing authority but are being held by the Sheriff as ex officio tax collector, in segregated accounts, pending a determination of whether or not the taxes are in fact owed.

Additionally, as noted above, Comm-Care erred in pursuing its protest

through the Tax Commission rather that through the District Courts pursuant to the Supreme Court's ruling in Triangle Marine.

D. APPELLATE CONTENDS THAT THE TRIAL COURT ERRED BY DENYING COMM-CARE JUDICIAL REVIEW IN ACCORDANCE WITH LA. R.S. 47:1998 THEREBY DENYING IT DUE PROCESS OF LAW.

Appellate contends that the trial court denied it due process by denying it judicial review of its claim in the present case.

Appellate relies on a substantial number of U.S. Supreme Court cases dealing with appeals by various taxpayers throughout the United States. However, these cases do have one common thread, they deal with taxes which are assessed in violation of federal law. The present case does not deal with such an issue at all.

Certainly any litigant is entitled to basic due process. The U.S. Supreme Court has described the "root requirement" of the Due Process Clause as "That an individual be given an opportunity for hearing before he is deprived of any significant property interest." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985). However, the cases cited by Appellate in the present case do not deal with the same situations as the case at bar. There are no allegations contained in the petition for review that the taxes

sought to be collected were imposed in violation of the laws or the Constitution of the United States. In fact, the Appellate is claiming a Louisiana Constitutional Exemption, pursuant to Article VII, Section 21B (1)(a).

Appellate cites McKesson Corp v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36 (1990) for the proposition that due process under the Fifth and Fourteenth Amendments require states to provide a "clear and certain remedy" for aggrieved taxpayers to a contest tax assessments. Whereas that statement is in fact contained in McKesson, it is an incomplete citation to the quote, in that McKesson dealt with circumstances under which the state allowed tax preferences for alcoholic beverages manufactured from certain products grown in the state, and the case involved an allegation that such taxes violated the Commerce Clause of the United States Constitution, and that it discriminated against interstate commerce.

The case of Reich v. Collins, 115 S.Ct. 547 (1994) cited by Appellate also contains similar language with regard to the "clear and certain remedy". However, Reich dealt with taxes assessed by the State of Georgia against retirement benefits paid by the Federal Government, but exempted retirement benefits paid by the state. The issue

dealt with the illegally assessed taxes required to be paid by federal retirees and the discrimination against those retirees.

The Appellates further rely on Carpenter v. Shaw, 280 U.S. 363 (1930). That case dealt with an interpretation of a federal treaty between the United States and the Choctaw and Chickasaw tribes. In Shaw, the State of Oklahoma was attempting to assess ad valorem taxes which the Supreme Court ultimately determined were in contravention of an 1890 treaty.

All of these cases have the consistent thread of taxes attempted to be assessed by the various states which ultimately were determined to have been violative of either federal statutory or constitutional provisions. Such is not the situation in the case at bar, and accordingly, although the language cited by Appellate may be accurate, it does not provide authority for this court to utilize the rulings by the Supreme Court in those respective cases.

Appellate contends that it was denied due process since it was not granted a review in the present case. However, the failure of the Appellate to obtain the review was due to its own poor judgment and erroneous decisions, not to any unconstitutional tax or violation of Federal Law.

In Appellate's petition, Appellate acknowledges that the Petitioner filed

for an exemption from taxes but that the assessors disallowed petitioner's claims. See paragraphs 8 and 9 of petition. Appellate further avers that the Petitioner filed notices of appeal before the boards of review and ultimately appealed directly to the Tax Commission. See Paragraphs 10 through 12 of the original petition. Therefore, Petitioner was well aware, that its request for exemption had been denied, and was aware of the amount of the taxes owed on each of its properties. It would have been a very simple matter for the Appellate to have paid its taxes under protest, as it ultimately did, and to sue pursuant to Section 2110. The failure of the appellate to take such action timely is the fault of no one but itself, and no one is to blame but the Appellate. Therefore no state action has resulted in a denial of due process to the Appellate. If the Appellate did not abide by the Statutory scheme provided, no one else can be blamed.
Appellate further contends that it chose to contest the 1995 assessments pursuant to what it believed to be a "clear and certain" remedy pursuant to R.S. 47:1998, and that after having complied with what it thought the requirements of 1998 to be, was told by the trial court that it was necessary to read the statute in pari materia with others. Appellate contends that this is a denial of due process. This argument

ignores the fact that Comm-Care and its counsel had notice prior to the end of 1995 that the courts of Louisiana were in fact going to interpret Section 1998 in conjunction with Section 2110 and other portions of Title 47.

Comm-Care and it's present counsel were parties to a proceeding before the 19th Judicial District Court, in which Judge Frank Saia rendered judgment on July 31, 1995 sustaining a peremptory exception of prescription. That case ultimately was affirmed by the First Circuit Court of Appeal, Docket number 96-CA-0039, in which case writs have been granted by the Supreme Court of Louisiana, and a decision is pending, in case number 96-C-2455. Additionally, the First Circuit had previously addressed a similar issue in Capital Drilling Company v. Graves, 495 So. 2d, 487 (La. App. 1st Cir. 1986). Accordingly, Appellate was on notice that the courts in Louisiana, and particularly in the First Circuit, were going to interpret sections of Title 47 together, and accordingly, the courts of this state did not change course, they merely provided more detailed analysis and reasoning for the same action previously taken by the courts.

Furthermore, Appellate's reliance on Reich, supra. is ill founded in that the Supreme Court in that case did not absolutely bar states from reconfiguring its schemes but only form "unfairly"

doing so in the form of a bait and switch tactic. See Reich page 550. As discussed above, Appellate was on notice that the courts of this state were interpreting Sections 1998 and 2110 in conjunction with each other and therefore there was no unfair bait and switch change and the Appellate incorrectly tries to characterize itself as an innocent victim. In fact, as Appellate points out on page twelve of the brief filed herein, Comm-Care made a choice to contest the 1995 assessments by using Section 1998, and it apparently chose to do so without complying fully with the requirements of that section.

Appellate continues within its argument under this assignment of error to discuss rules of statutory interpretation. For purposes of this argument, Appellees will assume that this in fact is part of the same argument on the same assignment of error. The rules of statutory construction were addressed by this circuit in great detail in Capital Drilling, supra. and counsel calls to this courts attention the detailed analysis by that prior panel of the rules for statutory construction. Appellate contends that this court correctly analyzed various sections of Title 47 in that case and in the recent decision of Comm-Care Corporation v. Louisiana Tax Commission, 96-0039 (La. App. 1st Cir. 1996), and that, as argued

above, Section 1998 must be interpreted in conjunction with Sections 2101 and 2110.

Appellate cites the cases of Smith v. Town of Vinton, 25 So. 2d, 237 (La. 1946) and Kaufman v. State Department of Public Safety and Driver's License Division 286 So. 2d, 723 (La. App. 1st Cir. 1973) for the proposition that statutory rules of construction require that statues be strictly construed. Appellees agree that such is the case, and that an examination of Title 47 in its entirety, including the organization of the sections into various chapters clearly shows the legislative intent to have a predeprivation and a postdeprivation remedy. However the sections are not designed to be and cannot be read in isolation from each other, totally segregated and apart, with each statute standing on its own. Appellate's own petition argues against such interpretation, since section 1998 on its face refers to section 2110 for purposes of determining how suits under protest are to be handled. To read any of these statutes in isolation by themselves would in fact lead to absurd consequences, in that no complete remedy would be provided to any taxpayers. The sections must be examined as a whole and read in conjunction with the entirety of the sections applicable to the same issues.

III. CONCLUSION

The Trial Court was correct in its rulings in the present case, and correctly maintained the exception of prescription filed in the case.

Section 1998 must be read in conjunction with Section 2101 and 2110. Failure to do so would lead to absurd consequences. The only "due" date established in Title 47 provides that the ad valorem taxes are due by December 31. Failure to pay the taxes when due deprives a taxpayer of the right to proceed to pay the taxes at some subsequent date under protest and later seek a refund of those taxes.

The Appellate has not been denied due process, and in fact has a history of litigation in this area and was well award of the provisions of Louisiana Courts with regard to both Sections 1998 and 2110, and prior to December 31, 1995, was on notice that those sections were in fact being read in conjunction by the courts of this state, accordingly, the Appellate had ample notice and opportunity to timely pay its taxes. Its failure to do so is the sole and only cause of its loss of its right to litigate the issue. It has not been denied due process by any actions of any party to this proceeding.

Appellees respectfully request that the judgment of the trial court be affirmed and that this appeal be dismissed at Appellate's cost.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tony C. Tillman, hereby certify that I forwarded a true and correct copy of the foregoing counsel of record for all the other parties in this action: Paul S. West, Vyrona M. Wiltz, John A. Stassi II, by placing same in the U.S. Mail and sufficient postage to ensure delivery on this the 28th day of April, 1997.

/s/Tony C. Tillman
Tony C. Tillman

SUPREME COURT OF LOUISIANA

NO. 98-C-1216

COMM-CARE CORPORATION

PLAINTIFF-APPLICANT

VERSUS

TAX COMMISSION, and LEE J. THEVENOT, in his capacity as Assessor for PARISH OF AVOYELLES; JEWETTE FARLEY, in her capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER in his capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION; EUGENE CAVANAUGH, in his capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES PARISH; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA; RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and JOE TORN TRUZLER, in his capacity as Sheriff and Ex-Officio tax Collector of the PARISH OF CATAHOULA; WILLIE WAYNE HOUCK, in his capacity as Sheriff and Ex-Officio tax Collector of the PARISH OF LINCOLN; WILLIAM EARL HILTON, in his capacity as Sheriff and ex-Officio tax Collector of the PARISH OF RAPIDES; FRANK A. HOWARD, in his capacity as Sheriff and ex-Officio tax Collector of the PARISH OF VERNON; HAROLD L. TRIDICO,

in his capacity as Sheriff and ex-Officio tax Collector of the PARISH OF ASCENSION; WILLIAM BELT, in his capacity as Sheriff and ex-Officio Tax Collector of the PARISH OF AVOYLLES; M.BOLIVAR BISHOP, IN HIS CAPACITY AS Sheriff and ex-Officio Tax Collector of the PARISH OF BEAUREGARD; ELMER LITCHFIELD, in his capacity as Sheriff and Ex-Officio tax Collector of the PARISH OF EAST BATON ROUGE; LAYMON GODWIN, IN HIS CAPACITY AS SHERIFF AND EX-OFFICIO TAX Collector of the PARISH OF OUACHITA

DEFENDANT-RESPONDENT

ON APPLICATION FOR SUPERVISORY AND REMEDIAL WRITS OF CERTIORARI OR REVIEW FROM THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE PARISH THE HONORABLE CELIA R. CANGELOSI, JUDGE DIVISION "M" CIVIL DOCKET NO. 425,365 AND THE FIRST CIRCUIT COURT OF APPEAL 97/CA/0555

OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI OR REVIEW

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FARLEY, ROY D. MILLER, GERALD MCCRORY, JR., EUGENE CAVANAUGH, FRANK GRANGER, III, RALPH GILL, CARMON WALKER, RICH BAILEY, IN THIER RESPECTIVE CAPACITIES AS THE ASSESSOR FOR THEIR RESPECTIVE PARISH

CIVIL CASE

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OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI OR REVIEW

Defendants/Respondent, Frank A. Howard, Lee J. Thevenot, Jewette Farley, Roy D. Miller, Gerald McCrory, Jr., Eugene Cavanaugh, Frank Granger, III, Ralph Gill, Carmon Walker, and Rich Bailey, in their respective capacities as the Assessor for their respective Parish, they file this opposition to the Application for Writs of Certiorari or

review filed by Applicant, Comm-Care Corporation herein.

Respondents have no disagreement with applicants Statement of the Applicant introduced overwhelming and uncontroverted evidence to the tax Commission. The issue on the Merits is not before this Court since the case was disposed of by Trial Court and the Court of Appeal on an exception, and accordingly, the evidence introduced to the Commission was never examined by the trial Court nor the Court of Appeal and it is therefore not an issue in this application.

ASSIGNMENT OF ERRORS ALLEGED BY APPLICANT

A. The Court of Appeal erred in maintaining defendant's exception of prescription because the statute under which this cause of action arises does not require that the subject taxes must be paid timely.

B. The Court of Appeal erred by reading La. R.S. 47:2110 in *pari materia* with La. R.S. 47:1998 because these two statutes were enacted at different times for different purposes.

C. The Court of Appeal erred in maintaining Defendant's exception of prescription in a Section 1998 case when it was impossible to pay the taxes when "due" without divesting the Tax Commission of its Jurisdiction.

D. The Court of Appeal erred in denying Comm-Care judicial review in accordance with LA. R.S. 47:1998 thereby denying it due process of law.

SUMMARY OF THE ARGUMENT

The Trial Court was correct in its ruling, and in concluding that LSA R.S. 47:1998 must be read in conjunction with Sections 2101 and 2110. Failure to do so would lead to absurd consequences. The only "due" date established in Title 47 provides that ad valorem taxes are due by December 31, 1998.

ARGUMENT

A. THE TRIAL COURT ERRED IN MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION BECAUSE THE STATUTE UNDER WHICH THE CAUSE OF ACTION ARISES DOES NOT REQUIRE THAT THE SUBJECT TAXES MUST BE PAID BY DECEMBER 31, 1998.

B. THE TRIAL COURT ERRED IN READING LA. R.S. 47:1998 IN *PARI MATERIA* WITH LA. R.S. 47:2110 BECAUSE THESE TWO STATUTES WERE ENACTED AT DIFFERNET TIMES FOR DIFFERENT PURPOSES.

Applicant contends that the Trial Court erred in maintaining the Defendant's Exception of Prescription because it contends R.S. 47:1998 does not require that subject taxes must be paid by December 31. This argument is closely related to the Assignment of Error B and the two (2) arguments will therefore be briefed herein together.

These arguments were raised by the Defendant at the Trial Court level, and addressed by Judge Cangelosi in her written reasons. As Judge Cangelosi sets forth in her written reasons for Judgment, which are attached to Applicant's Writ Application as Exhibit "C", citing the decision of the Court of Appeal, First Circuit in Comm-Care Corporation vs. La. Tax Commission, 96-0039 (La. App. 1st Cir. 1996) and cases cited therein, Judge Cangelosi states:

> The First Circuit has consistently, continually, and recently held that taxes "paid under protest" must be paid prior to becoming delinquent and that taxes paid after the due date of December 31, of the tax year are delinquent taxes, defeating a claim for recovery of delinquent taxes paid under protest under Section 2110. (See page 4 of Judge Cangelosi's written reasons.)

Judge Cangelosi further states that she could not ignore the First Circuit's construction of the term "due" as distinguished from taxes that are "delinquent". As Judge Cangelosi correctly notes, Title 47 does not provide any scheme whereby a taxpayer can use an administrative appeal process to operate as a stay or suspension to pay the taxes when they become "due". Additionally, as she correctly notes, R.S. 47:1998A(1) does specifically provide that any taxpayer who

files suit under that section and whose taxes have become due **shall** pay the taxes under protest. The legislature obviously contemplated that cases arising under Section 1998 would still be pending as of December 31, and specifically provided that to preserve other rights to litigate the issue of the taxes, the taxes must be paid under protest when they become due. There is therefore no great mystery or revelation in an argument that 1998 does in fact require the timely payment of taxes, as defined by R.S. 47:2101.

The Applicant also ignores the ruling of the Supreme Court of Louisiana in Triangle Marine, Inc. vs. Savoie, 95-2873 (La. 1996). Although that decision was not rendered by this Court until October 15, 1996, after that suit was filed in the present matter on February 27, 1996, Triangle Marine is a clarification of the law, and not a departure from prior law.

As the Court notes in Triangle Marine, the Supreme Court has recognized a line of distinction between correctness and legality challenges. See Morgan, Louisiana and Texas Railroad Steamship Company v. Picot, 50 La. Ann. 737, 23 So. 948, 950-51(1898). Correctness challenges are directed at issues of regularity or correctness of assessment, and legality challenges are "directed at issues involving the claims the assessment is void for radical defect or that the assessment is inherently invalid." The

Court further notes in Triangle Marine that those distinctions were reaffirmed in Soniat v. Board of State Affairs, 146 La. 450 83 So. 760, 762 (1919).

This Court held in Triangle Marine, that "the vessels owner's challenge to the imposition of ad valorem taxes assessed against allegedly exempt property presents a tax legality challenge. Plaintiff proceeded properly in District Court under LSA-R.S. 47:2110 to contest these taxes as a tax assessment on exempt property is illegal".

Triangle Marine is not a departure in from prior law in Louisiana, and therefore Comm-Care was aware that the appropriate procedure was to proceed not through 1998, but through 2110 to test the legality of the assessment.

As the Court notes in Triangle Marine, the case of Abraham v. Carter, 580 So. 2d 485 (La. App. 4th Cir. 1991) had, prior to Triangle Marine, correctly explained the distinction between a "correctness" claim and a "legality" claim.

Respondent contends that the Court of Appeal, First Circuit had previously addressed related issues and rendered a logical and reasonable interpretation of the *ad valorem* tax provisions in the case of Capital Drilling Co. vs. Graves 496 So. 2d 487 (La. App. 1st Cir 1986). The Court in that case faced a situation similar to that of the instant case, in which the taxes were not paid until

March 5, 1985 for taxes assessed for the year 1984. As the Court of Appeal pointed out in Bunch vs. Town of St. Francisville, 446 So. 2d 1357 (La. App. 1st Cir. 1984) "the meaning and intent of the law is to be determined by the consideration of the law in its entirety and all other laws on the same subject matter." Applicant vigorously argues that R.S. 47:1998 is a statute on its own, not part of the balance of the Title 47, and that it has to be interpreted in a vacuum, on its own, without regard to the balance of the sections dealing with *ad valorem* taxes.

R.S. 47:1998 is part of Subtitle III, provisions relating to *ad valorem* taxes, Chapter III, Assessment, Part III, Assessment Procedure. However, §2101 establishes the time for payment of **all** *ad valorem* taxes, and cannot be totally separated or segregated from §2110.

Section 2101 provides in part, in Subsection A(1) that

> "all taxes shall be collected in the year in which the assessment thereof is made, and they shall be designated as the 'taxes for the year,' accordingly as they are collectable. The taxes assessed in each year shall be due in that calendar year....."

Accordingly, all *ad valorem* taxes are due in the calendar year for which they are assessed. Therefore, as §2101 A(1) goes on to provide, "they shall be

paid on or before the 31st day of December in each respective year...."

Applicant contends that the ruling of the Trial Court and the Court of Appeal in Capital Drilling and in the instant case before the First Circuit, denies the Applicant, as a tax protestor, the opportunity to be heard. Respondent questions how the interpretation in Capital Drilling and in the instant case before the First Circuit, denies the Applicant the right to be heard.

All that is required by Capital Drilling and the First Circuit's decision in the instant case to preserve the Applicant's right to a hearing, is to pay the taxes on or before December31st of the year in which they are assessed and due. Counsel fails to seethe distinction Applicant wants this Court to see with regard to its apparent argument that it should be allowed to pay the taxes at its whim, regardless of when they are assessed or when they are due, and still go forward with a suit to protest. Paying the taxes as they are due, as a normal, reasonable, business would do, does not deny the Applicant the opportunity to be heard; it merely imposes a reasonable condition upon the Applicant in order to preserve its rights.

The Respondent attaches hereto and makes a part hereof as Exhibit A, a copy of the Petition field in the 19th

Judicial District Court by Applicant. Respondent calls to the Court's attention Paragraph 2 of that Petition, in which Applicant relied on R.S. 47:1998 to establish its cause of action. Further, see Paragraph 4 of the Petition in which the Applicant admits that notices were forwarded to the Sheriffs of the various Parishes pursuant to the authority of R.S. 47:2110(E), and to the Prayer of the Petition in which the Applicant prayed for a refund of the taxes paid under protest, with interest, pursuant to R.S. 47:2110(A). Apparently, the Applicant wants Section 1998 and Section 2110 to be construed in *pari materia* when it is convenient and beneficial to do so, but wants Section 1998 to be interpreted in a vacuum when that suits the purposes of Applicant. Respondent contends that Paragraph 4 of Applicant's Petition is a judicial admission that Section 2110, in fact, applies to this case.

An examination of Section 2110 will reveal hat section does not provide any information with regard to who are that proper party Defendants, where the suit will be instituted, venue, or any other necessary matters to determine how to proceed to recover the funds. That information is contained in other sections of Title 47 including, but not limited to Section 1998.

Section 2110 (E) provides that the taxpayer pays his taxes in protest as

detailed in Subsection A, **and** files suit under the provisions of several other section of Title 47, one of which is R.S. 47:1998. Accordingly, Section 1998, clearly relates to other sections of Title 47, and cannot, as is urged by the Applicant, be interpreted in a vacuum.

The Louisiana Legislature also apparently construes R.S. 47:1998 and 2110 in *pari materia*, in that it recently had occasion to amend those sections twice in one session of the Legislature, and chose to amend them in the same act. Act 53 of the 1995 Louisiana Regular Session was approved by the Governor on June 12, 1995. the Act amended and reenacted portions of 1998(F) and 2110(A). Act 272 of the 1995 Louisiana Regular Session was approved by the Governor on June 14, 1995, and amended and reenacted R.S. 47:1998(A)(2) and (B)(3) and Section 2110. Act 272 reenacted the entirety of Section 2110, and included the provisions for notice to be served on the "Officer or Officers designated for collection of said taxes" and provided further that such notice was sufficient to cause those officers (normally being the sheriff and ex-Officio tax collector) that holds a set amount segregated pending the outcome of the law suit authorized by 2110. 2110(E) as enacted by Act 272 of 1995 specifically states that if suit is filed under the

provisions of R.S. 47:1856, 1857, or 1998, such notice as described above shall issue.

It appears quite clear that the Legislature chooses to deal with Sections 1998 and 2110 together, apparently acknowledging that the two (2) statutes deal with related issues.

As the First Circuit correctly pointed out in its recent Decision in Comm-Care Corporation vs. Louisiana Tax Commission, et al., 96-0039 (La. App. 1st Cir., 9/27/96), and in its prior Capital Drilling decision, the provisions of Section 2101A(A) and Section 2171 of Title 47 and Article VII, section 25 (A) of the Louisiana Constitution of 1974 establishes that "*ad valorem* taxes are payable in full on or before December 31 of the tax year." There are no provisions in Title 47 or in the Constitution for a litigant to institute proceedings with regard to a refund of **delinquent** taxes.

As the First Circuit pointed out in Capital Drilling and in Bunch (Pg. 1360)

"a construction of a law which creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the law and will carry out the intention of lawmaker..."

Additionally, as the First Circuit pointed out in Capital Drilling (Pg. 492)

> "to adopt the Plaintiff/Appellant's argument would be to give litigants suing under R.S. 47:2110 a substantial advantage over those pursuing a correctness claim under R.S. 47:1998."

It does not appear to be the legislative intent to give advantages to the tax protestors under one claim versus another; such a construction defies common sense and the plain words of the law.

Applicant relies on Churchill Farms, Inc. vs. Louisiana Tax Commission 338 So. 2d 963 (LA App. 4th Cir 1976) for the proposition that §1998. Respondent agrees that was, in fact, the ruling of the Fourth Circuit Court of Appeals, according to the facts presented to it in the Churchill Farms case. However, the case is distinguishable since the issue of timely payments was not before the Court not was it addressed in any fashion. The issue of when taxes are found to be due, as that is defined by §2110(A), was not presented in Churchill Farms, and therefore Churchill Farms is not authority for the proposition that §2101 should not be construed in *pari materia* with §2110. Churchill Farms must be limited to its facts, which concern whether the taxpayer, as a

condition precedent to challenging the legality of assessment of §2110 had to file a sworn list of its assets. That issue is separate from the facts of the present case, and therefore the ruling in Churchill Farms is distinguishable and not relevant to the issue presented in the instant case.

Applicant further contends that it is somehow denied due process.

Applicant further contends that the Third Circuit in Rickey Tri-Key Partnership v. Dupleix, 462 So. 2nd 235, 236 9La. App. 3d Cir. 1985), is authority for the proposition that Section 1998 and Section 2110 should not be read in conjunction with each other. Judge Cangelosi took note of that decision, and rejected its reasoning, correctly noting that the late payment of taxes was not made the issue in that case. Therefore the decision of the court in Rickey is not authority for the proposition as cited by Applicant.

Furthermore, Comm-Care's reliance on Rickey is misplaced, in that it ignores Section 1998A(2) as discussed above, which requires that when the taxes become due, such taxes shall be paid under protest.

C. THE RESPONDENT CONTENDS THAT THE TRIAL COURT ERRED BY MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION IN A 1998 CASE WHEN IT WAS

IMPOSSIBLE TO PAY THE TAXES WHEN "DUE" WITHOUT DIVESTING THE TAX COMMISSION OF ITS JURISDICTION.

Respondent contends that Commcare is incorrect in its contention that the Tax Commission looses its jurisdiction totally if the taxes are paid if the decision is final. R.S. 47:1998 A(2) specifically requires the payment of taxes when they become due. R.S. 47:2110 provides that the taxes are paid under protest, and are held in a segregated account pending the outcome of the suit. Accordingly, the Respondents contend that the Tax Commission would not under such circumstances be divested totally of its jurisdiction, in that the taxes have not actually been paid to the taxing authorities but are being held by the Sheriff as ex-Officio tax collector, in segregated accounts, pending a determination of whether or not the taxes are in fact owed.

As discussed in the statutes above, there is a distinction between taxes being paid when "due" and "delinquent", and being "paid under protest". Respondent submits that R.S. 47:1990 would not prevent a change in an assessment if the taxes have been paid under protest, and it was ultimately concluded that the tax was illegal.

A close reading of that paragraph Section 1990 will reveal that it applies to corrections made "in order to make the assessment conform to the true and correct valuation, not to exceed its actual cash value..." Respondent submits that this section applies to "correctness" claims and not to "legality" claims.

Additionally, the Attorney General's opinion referred to by the Applicant, Opinion 77-1475 interprets 47:1990 to deprive the Tax Commission of the authority to change or correct the assessment after the taxes "have actually been paid." As discussed previously, actual payment is not made if paid under protest.

D. APPELLATE CONTENDS THAT THE TRIAL COURT ERRED BY DENYING COMM-CARE JUDICIAL REVIEW IN ACCORDANCE WITH LA. R.S. 47:1998 THEREBY DENYING IT DUE PROCESS OF LAW.

Applicant contends that the trial court denied it due process by denying it judicial review of its claim in the present case.

Applicant relies on a substantial number of U.S. Supreme Court cases dealing with appeals by various taxpayers throughout the United States. These cases do have one common thread, they deal with taxes which were assessed in **violation of federal law**. The

present case does not deal with such an issue at all.

Certainly any litigant is entitled to basic Due Process Clause as "that an individual be given an opportunity for hearing before he is deprived of any significant property interest." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985). However, the cases cited by Applicant in the present case do not deal with the same situations as the case at bar. There are no allegations contained in the petition for review that the taxes sought to be collected were imposed in violation of the laws of the Constitution of the United States. In fact, the Appellant is claiming a Louisiana Constitutional Exemption, pursuant to Article VII, Section 21B (1)(a).

Applicant cites McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36 (1990) for the proposition that due process under the Fifth and Fourteenth Amendments require states to provide a "clear and certain remedy" for aggrieved taxpayers to a contest tax assessments. Whereas that statement is in fact contained in McKesson, it is an incomplete citation to the quote, in that McKesson dealt with circumstances under which the state allowed tax preferences for alcoholic beverages manufactured from certain products grown in the state, and the

case involved an allegation that such taxes violated the Commerce Clause of the United States Constitution, and that it discriminated against interstate commerce.

The case of Reich v. Collins, 115 S.Ct. 547 (1994) cited by Applicant also contains similar language with regard to the "clear and certain remedy". However, Reich dealt with taxes assessed by the State of Georgia against retirement benefits paid by the Federal Government, but exempted retirement benefits paid by the state. The issue dealt with the illegally assessed taxes required to be paid by federal retirees and the discrimination against those retirees.

The Applicant further relies on Carpenter v. Shaw, 280 U.S. 363 (1930). That case dealt with an interpretation of a federal treaty between the United States and the Choctaw and Chickasaw tribes. In Shaw, the State of Oklahoma was attempting to assess ad valorem taxes which the Supreme Court ultimately determined were in contravention of an 1980 treaty.

All of these cases have the consistent thread of taxes attempted to be assessed by the various states which ultimately were determined to have been violative of either federal statutory or constitutional provisions. Such is not the situation in the case at bar, and accordingly, although the language cited

by Applicant may be accurate, it does not provide authority for this court to utilize the rulings by the Supreme Court in those respective cases.

Applicant contends that it was denied due process since it was not granted a review in the present case. However, the failure of the Applicant to obtain the review was due to its own poor judgment and erroneous decisions, not to any unconstitutional tax or violation of Federal Law.

In its original Petition, Applicant acknowledges that it filed for an exemption from taxes but that the assessors disallowed its claims. See paragraphs 8 and 9 of petition. Applicant further avers that it filed notices of appeal before the boards of review and ultimately appealed directly to the Tax Commission. See Paragraphs 10 through 12 of the original petition. Therefore, Petitioner was well aware, that its request for exemption had been denied, and was aware of the amount of the taxes owed on each of its properties.

The Applicant should have followed the procedures provided by Section 2110, and as the Fourth Circuit described in Abraham, supra., that section providing the appropriate remedy for raising the question of constitutionality of the assessment directly to District Court.

It would be have been a very simple matter for the Applicant to have paid

its taxes under protest, as it ultimately did, and to sue pursuant to Section 2110. The failure of the appellate to take such action timely is the fault of no one but itself, and no one is to blame but the Applicant. Therefore no state action has resulted in a denial of due process to the Applicant. If the Applicant did not abide by the statutory scheme provided, no one else can be blamed.

Applicant further contends that it chose to contest the 1995 assessments pursuant to what it believed to be a "clear and certain" remedy pursuant to R.S. 47:1998, and that after having complied with what it thought the requirements of 1998 to be, was told by the trial court that it was necessary to read the statute in *pari materia* with others. Appellate contends that this is a denial of due process to the Applicant. If the Applicant did not abide by the statutory scheme provided, no one else can be blamed.

Applicant further contends that it chose to contest the 1995 assessments pursuant to what it believed to be a "clear and certain" remedy pursuant to R.S. 47:1998, and that after having complied with what it thought the requirements of 1998 to be, was told by the trial court that it was necessary to read the statute in *pari materia* with others. Appellate contends that this is a denial of due process. This argument

ignores the fact that Comm-Care and its counsel had notice prior to the end of 1995 that the courts of Louisiana were in fact going to interpret Section 1998 in conjunction with Section 2110 and other portions of Title 47.

Comm-Care with it's present counsel, was a party to a proceeding before the 19th Judicial District Court, in which Judge Frank Saia rendered judgment on July 31, 1995 sustaining a peremptory exception of prescription. That case ultimately was affirmed by the Court of Appeal, First Circuit, Docket number 96-CA-0039, and which case was ultimately affirmed by the Supreme Court, on other grounds. Comm-Care v. Bishop 96-C-1711, consolidated with Comm-Care v. Louisiana Tax Commission, et al, 96-C-2455 (La. 1/21/98). Additionally, the First Circuit had previously addressed a similar issue in Capital Drilling Company v. Graves, 496 So.2d, 487 (La. App. 1st Cir. 1986). Accordingly, Applicant was on notice that the courts in Louisiana, and particularly in the First Circuit, were going to interpret sections of Title 47 together, and accordingly, the courts of this state did not change course, they merely provided more detailed analysis and reasoning for the same action previously taken by the courts.

Furthermore, Applicant reliance on Reich, supra. is ill founded in that the Supreme Court in that case did not

absolutely bar states from reconfiguring its schemes but on from "unfairly" doing so in the form of a bait and switch tactic. See Reich page 550. As discussed above, Applicant was on notice that the courts of this state were interpreting Sections 1998 and 2110 in conjunction with each other and therefore there was no unfair bait and switch change and the Applicant incorrectly tries to characterize itself as an innocent victim. In fact, as Applicant points out on page nine of the Application for Writs filed herein, Comm-Care made a choice to contest the 1995 assessments by using Section 1998, and it apparently chose to do so without complying fully with the requirements of that section, as interpreted by the Court's of this state.

Applicant continues with its argument under this assignment of error to discuss rules of statutory interpretation. For purposes of this argument, Applicant will assume that this in fact is part of the same argument on the same assignment of error. The rules of statutory construction were addressed by the Court of Appeal, First Circuit, in great detail, in Capital Drilling, supra., and counsel calls to this courts attention the detailed analysis by that Court of the rules for statutory construction. Respondent contends that the court correctly analyzed various sections of

Title 47 in that case and in the recent decision of Comm-Care Corporation v. Louisiana Tax Commission, 96-0039 (La. App. 1st Cir. 1996), and that, as argued above, Section 1998 must be interpreted in conjunction with Sections 2101 and 2110.

Applicant cites the cases of Smith v. Town of Vinton, 25 So. 2d, 237 (La. 1946) and Kaufman v. State Department of Public Safety and Driver's License Division 286 So.2d, 723 (La. App. 1st Cir. 1973) for the proposition that statutory rules of construction require the statutes be strictly construed.

Respondents agree that such is the case, and that an examination of Title 47 in its entirety, including the organization of the sections into various chapters clearly shows the legislative intent to have a predeprivation and a postdeprivation remedy. However he sections are not designed to be and cannot be read in isolation from each other, totally segregated and apart, with each statute standing on its own. Applicant's own petition argues against such interpretation, since section 1998 on its face refers to section 2110 for purposes of determining how suits under protest are to be handled. To read any of these statutes in isolation by themselves would in fact lead to absurd consequences, in that no complete remedy would be provided to any taxpayers. The

sections must be examined as a whole and read in conjunction with the entirety of the sections applicable to the same issues.

CONCLUSION

The Trial Court and the Court of Appeals were correct in their rulings in the present case, and correctly maintained the exception of prescription filed in the case.

Section 1998 must be read in conjunction with Section 2101 and 2110. Failure to do so would lead to absurd consequences. The only "due" date established in Title 47 is in Section 2101, which provided that ad valorem taxes are due by December 31. Failure to pay the taxes when due deprives a taxpayer of the right to proceed to pay the taxes at some subsequent date under protest and later seek a refund of those taxes.

The Applicant has not been denied due process, and in fact has a history of litigation in this area and was well aware of the provisions of Louisiana Courts with regard to both Sections 1998 and 2110, and prior to December 31, 1995, was on notice that those sections were in fact being read in conjunction by the courts of this state, and accordingly, the Applicant had ample notice and opportunity to timely pay its taxes. Its failure to do so is the sole and only cause of its loss of its right

to litigate issue. It has not been denied due process by any actions of any party to this proceeding.

Respondents respectfully request that the Judgment of the Trial Court and the Appellate Courts be affirmed and that his application be dismissed at Applicant's cost.

Respectfully submitted,

/s/ Tony C. Tillman
Tony C. Tillman
Attorney for Respondents, Frank A. Howard, Lee J. Thevenot, Jewette Farley, Roy D. Miller, Gerald McCrory, Jr., Eugene Cavanaugh, Frank Granger, III, Ralph Gill, Carmon Walker, and Rich Bailey, in their respective capacities as the Assessor for their respective Parish
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CERTIFICATE OF SERVICE

I Tony C. Tillman, hereby certify that I forwarded a true and correct copy of the foregoing to all of the following counsel for other parties in this action: Paul West, W. Mark McKee, John F. Weeks, II, V. Russell Purvis, Leu Anne Lester Greco, David R. Lestage,

James T. Lee, Vern M. Wilts, and John A. Stasis, II, by placing same in the U.S. Mail with sufficient postage to ensure delivery on this 26th day of May, 1998.

/s/ Tony C. Tillman
Tony C. Tillman